2009

State of Utah v. Richard Michael Sheehan : Brief of Appellee

Utah Court of Appeals

Case No. 20090913-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

vs.

ROBERT MICHAEL SHEEHAN,
Defendant/Appellant.

Brief of Appellee

Appeal from a conviction of one count each of aggravated burglary, a first degree felony, and aggravated assault, a third degree felony, in the Third Judicial District Court, Salt Lake County, the Honorable William Barrett presiding.

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Oral Argument Requested

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES AND RULES

OTHER AUTHORITIES

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STATEMENT OF JURISDICTION

Defendant appeals from convictions for one count each of domestic violence aggravated burglary, a first degree felony, in violation of UTAH CODE ANN. § 76-6-203 (West 2004), and domestic violence aggravated assault, a third degree felony, in violation of UTAH CODE ANN. § 76-5-103 (West 2004). R.566-67. This Court has jurisdiction under UTAH CODE ANN. § 78A-4-103(2)(j) (West 2009).

STATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion when it admitted the State's expert testimony on latent print analysis without first holding a *Rimmasch* hearing?

Standard of review. "'The trial court has wide discretion in determining the admissibility of expert testimony, and such decisions are reviewed under an abuse of discretion standard.'" *State v. Hollen*, 2002 UT 35, ¶ 66, 44 P.3d 794 (quoting *State v. Larsen*, 865 P.2d 1355, 1361 (Utah 1993)). A decision to admit or exclude expert

testimony will not be reversed "'unless the decision exceeds the limits of reasonability.'" *Id.* (quoting *Larsen*, 865 P.2d at 1361).

2. Whether the trial court abused its discretion by: a) excluding Defendant's expert witness; or b) limiting defense counsel's cross-examination of the State's expert?

Standard of Review for issue 2a) The standard of review is the same as that for issue one.

Standard of Review for issue 2b) "When reviewing a trial court's decision to limit cross-examination, [this Court will] review the legal rule applied for correctness and the application of the rule to the facts of the case for an abuse of discretion." *State v. Chavez*, 2002 UT App 9, ¶ 17, 41 P.3d 1137.

3. The State agrees that the Judgment and Sentence contains a clerical mistake regarding the restitution amount.

Standard of review. This issue was not raised below; therefore, no standard of review applies. A clerical mistake "may be corrected by the court at any time." Utah R. Crim. P. 30(b).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provision and court rules are reproduced in Addendum A:

U.S. CONST. amend. VI
Utah R. Evid. 702 (Testimony by experts)
Utah R. Evid. 703 (Bases of opinion testimony by experts)
Utah R. Crim. P. 30(b) (clerical mistakes in judgments)

STATEMENT OF THE CASE

The State charged Defendant by amended information with one count each of domestic violence aggravated burglary, a first degree felony in violation of UTAH CODE ANN. § 76-6-203, and domestic violence aggravated assault, a third degree felony in violation of UTAH CODE ANN. § 76-5-103. R.489-90. Mr. Walter Bugden and Ms. Tara Isaacson represented Defendant. R.7, 588:1.

Before trial, defense counsel filed a "Motion for *Rimmasch* hearing to determine the admissibility of partial palm print evidence." R.216-36. The trial court held a hearing and denied the motion based on this Court's holding in *State v. Quintana*, 2004 UT App 418, 103 P.3d 168, that *Rimmasch* does not apply to expert testimony on latent print analysis. R.584:6-9, 17. (A copy of the hearing transcript is included in **Addendum B**).

Defense counsel then filed a "Motion in Limine Re: Palm Print Evidence Expert," seeking permission for Simon A. Cole, Ph.D., to provide expert testimony. R.339-350. After a hearing, the trial court also denied that motion on the grounds that defense counsel could adequately cover Cole's proposed testimony on cross-examination, and because, as this Court recognized in *Quintana*, the Utah Supreme Court has held that latent print evidence is not subject to reliability problems requiring special treatment. R.589:11-16. (A copy of the hearing transcript is included in **Addendum C**).

A jury convicted Defendant as charged. R.498-99. The trial court sentenced Defendant to serve consecutive terms of five years to life and zero to five years in the

Utah State Prison and imposed restitution. R.566-67. Defendant timely appealed. R.572.

STATEMENT OF FACTS[1]

During the early morning hours of 11 December 2006, Defendant spotted his ex-girlfriend, Tiffani Foote, leaving a bar with another man. Defendant went to Foote's home, entered through an unlocked sliding glass door, and found Foote passed out in the basement with her companion. Defendant hauled Foote upstairs to her bedroom and beat her severely. Foote could not identify Defendant, but she did not need to. He left his palmprint in her blood.

Defendant refuses to accept "that it was over"

Defendant and Foote had lived together when Foote lived in Sandy. R.590:27. After they broke up, Foote moved to the Willow Creek area of Salt Lake County. R.588:108, 127; 589:201-02; 590:118-19. Defendant knew where Foote's new home was; however, he never stayed in that home and, in fact, was not welcome there. R.588:108; 589:201-02; 590:119-120, 124.

After their breakup, Defendant sent Foote several unwanted text messages. R.588:109-10; 589:214-15; 590:96-98. Foote asked a close friend's husband, Jared Byam, to talk to Defendant about the texts. R.588:109-110.

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[1] The State recites the facts in the light most favorable to the jury's verdict. *See State v. Pinder*, 2005 UT 15, ¶ 2, 114 P.3d 551 ("'On appeal from a jury verdict, we view the evidence and all reasonable inferences in a light most favorable to that verdict and recite the facts accordingly.'") (quoting *State v. Gordon*, 913 P.2d 350, 351 (Utah 1996)).

Later, on an October 2006 night, Foote was sitting outside on her deck when Defendant scaled her back fence and confronted her. R.589:215-16. He told her that "if [she] didn't give him another chance then he basically didn't have a reason to go on and was going to kill himself." R.589:216. She told him that "there wasn't a chance" and also told him to leave. R.589:216-17. When he would not, Foote again called Byam for assistance. R.588:110-11. During the call Foote's voice was "shaky" and sounded upset, like she had been crying. R.588:111.

Byam, who found Foote and Defendant on her back deck, asked Defendant to leave. R.588:112, 115. Defendant refused, demanding that he had to "hear[] from Foote that it was over." R.588:116. She again confirmed that their relationship was finished and Defendant left. R.588:116-17.

Defendant follows Foote as she leaves Hog Wallow

Shortly after midnight on 11 December 2006, Foote met some co-workers at the Hog Wallow bar. R.588:143, 185-87. Around 1:45 a.m., Foote left to go to her Willow Creek home with one of her male co-workers, Michael Thompson. R.588:106, 187. Thompson drove Foote's car because he was less intoxicated. *Id.*

Defendant and Foote had frequented Hog Wallow during their relationship. R.590:79. Defendant happened to be driving near Hog Wallow when Foote's car pulled out in front of him. R.590:76-77, 79. He recognized the car as Foote's because it had a distinctive sticker on the back window. R.590:77. Defendant called 911 to report that the driver of Foote's car was drunk. R.590:79-80. He said that he observed "a guy" driving with a passenger. R.588:96 (State's Exhibit 1b, 911 call recording). He reported

that he believed the car would be going to the Willow Creek area. R.588:96, 143-44. He gave the dispatcher a false name and phone number because he wanted to "stay anonymous." R.588:80.

Foote awakes "in a pool of blood on [her] own bed"

Thompson and Foote arrived at Foote's home and had sex in a downstairs TV room. R.588:188-89, 208. Both were intoxicated and ultimately passed out downstairs. R.588:201-02, 211; 589:211. Foote's thirteen-year-old son was asleep upstairs in the bedroom next to hers. 589:59, 63, 66.

Thompson awakened to the sound of dogs barking. R.588:192. He remembered hearing the dogs barking downstairs, then he heard the upstairs sliding glass door open and the dogs going outside. *Id.* Foote was still unconscious on the floor. R.588:192-93. The sliding glass door had been left unlocked. R.588:168; 589:220.

Thompson then remembered the sound of someone coming down the stairs. R.588:193. Thompson assumed that it was Foote's son. *Id.* Thompson saw Foote get dragged a short distance and he believed that she was being carried upstairs. R.588:194. Thompson had opened his eyes, but he did not look around or get up because he was embarrassed and "didn't want to be the random guy to stand up in his underwear and say ['H]i.[']" R.588:194. Thompson was also having a hard time making sense of what was happening because he was "still pretty tired and intoxicated." R.588:193, 196.

Thompson then remembered hearing someone moving around upstairs and the sound of "maybe someone pulling out pots and pans and dishes." R.588:194. He also remembered hearing the sliding glass door opening again. R.588:196. Thompson then

woke up and checked to see if Foote was still in the basement. *Id.* When he did not see her, he fell back asleep on the couch. *Id.*

Around 4:00 a.m., Foote awoke "in a pool of blood on [her] own bed," showered, and called 911. R.589: 21-22,212 (State's Exhibits 39(a)&(b)). Foote was treated at a hospital for "multiple bruises and lacerations," likely caused by "repeated blows to the head." R.589:7. Her wounds required several staples and stitches to close. R.589:8-12. She also suffered a broken nose. R.589:14-15. Foote's pillows and sheets were covered in a significant amount of blood. R.588:164 (State's Exhibits 21 & 22). Foote's son slept through the assault. R.588:63-64, 68.

Outside Foote's house, police found footprints in the freshly fallen snow. R.588:146-48. There were footprints in the front yard near the basement window of the room where Foote and Thompson had been sleeping. R.588:151-53, 162. The footprints led from the front yard around the corner of the house to a fence, then continued on the other side of the fence into the back yard and up to a deck with a sliding glass door. R.588:147-48, 157-61, 168. The footprints then led down the deck and away from Foote's house toward her neighbor's driveway, where tire tracks appeared in the snow. R.588:160-61. The footprints had a waffle-type pattern like that found on work boots. R.588:155-56.

Foote accuses Thompson

Foote told the 911 operator and responding officers that Thompson had assaulted her. R.588:175-80; 589:195. Officers discovered Thompson still half asleep on the downstairs couch. R.588:153. Officers questioned him, but eventually eliminated him as

a suspect because Foote's story was inconsistent with the physical evidence. R.588:154-55; 180-81. There was no blood on Thompson, his clothing, or the sheet he slept on. R.588:153-54. There was no blood in the basement, nor was the basement in disarray. R.588:154. Thompson's hands were not scratched or swollen, nor were his knuckles bloody. R.588:154-55. The pattern on Thompson's shoes did not match the footprints outside. R.589:24-25.

Nevertheless, Foote told a detective that she was "100 percent sure" that Thompson had assaulted her. R.589:228-36. The detective told Foote that the evidence was not consistent with her story and that it was important for the police to arrest the right person. R.589:244. The detective eventually told Foote that "everybody" suspected that Defendant had assaulted her, encouraged her not to "protect" Defendant, and asked for "anything" from Foote that could place him at the scene. R.589:262, 187, 209. A few days after her interview, Foote called the detective and said that she was beginning to remember more details, including Defendant beating her over the head. R.589:264-67.

The prosecution did not call Foote as a witness, but defense counsel did. R.589:184. The prosecutor explained during closing argument that she did not call Foote because her statements about who assaulted her were unreliable. R.590:171. During examination by defense counsel, Foote testified that she never saw the person who attacked her. R.589:221. Nevertheless, she testified that Thompson assaulted her downstairs and Defendant assaulted her upstairs. R.589:193.

Police discover Foote's dress and panties in Defendant's closet

Seven or eight hours after the assault, a detective interviewed Defendant at a jobsite where he worked as a painter. R.590:28-29, 38. He was not wearing work boots. R.590:38. Foote's son, however, testified that he remembered Defendant wearing work boots to work "[a]ll the time" when Defendant lived with them in the Sandy home. R.590:125.

About a week after the assault, police searched Defendant's home looking for work boots. R.589:38. They found none. *Id.* They did find, however, one of Foote's velvet dresses and two pair of her panties in Defendant's closet near a box of pornographic magazines. R.589:217, 274-75. The velvet dress was Foote's favorite. R.589:217. Defendant also "loved" the dress and would ask Foote to try it on. R.589:218. When police found the dress, a hole had been ripped in what Foote described as the dress's "crotch" area. R.589:217. Foote had the dress and panties after she moved into her Willow Creek home. R.589:218-19. She never gave them to Defendant; rather, they simply disappeared from her home. *Id.* In Defendant's home, police also found Foote's Utah identification card and a picture of Foote and her son. R.589:39-40.

Defendant's bloody palmprint

Elisa Macken-Farmer from the State Crime Lab analyzed a partial palmprint discovered in the blood on one of Foote's pillows. R.589:78-79; 127, 142-44. Farmer testified that the latent print matched Defendant and did not match either Foote or Thompson. R.589:155-56.

Defendant's contradictory statements

When a detective interviewed Defendant on the day of the assault, he told her that he had been with his then girlfriend, Heidi, on the previous night, had left her home around 10:30 p.m., and had then gone home to bed. R.589:43. At trial, however, Defendant admitted that he was not at his home that night but had been out, seen Foote's car, and called 911. R.590:76-80.

Defendant also testified that that he and Foote were still seeing each other after she moved to her Willow Creek home. R.590:44-47, 56-62. He claimed that he spent many nights in the home with her, sometimes ate dinner there, and that he, Foote, and Foote's son had even gone to see a movie together during that time. *Id.* Foote testified, however, that Defendant was never invited to her Willow Creek home. R.589:201-02. Foote's son confirmed that Defendant had never stayed at the Willow Creek home or eaten dinner there, nor did he remember ever going to a movie with Defendant. R.589:60-61; 590:124-25. Jared Byam and his wife, who was Foote's close friend, also confirmed that Defendant never stayed in Foote's Willow Creek home. R.588:108; 590: 119.

SUMMARY OF ARGUMENT

I. The trial court did not abuse its discretion in refusing to hold a *Rimmasch* hearing on the reliability latent print analysis, because *Rimmasch* does not apply.[2] Current rule 702, Utah Rules of Evidence, has replaced the *Rimmasch* test and now

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[2] The State will use the term "latent print analysis" to refer to both palmprint and fingerprint analysis. The State's expert testified that both involve the same methodology. R.589:133. Defendant conceded below that "the process of identifying a latent palm print is substantially similar to the process of fingerprint identification." R.223 n.1.

governs the admissibility of all expert testimony, including testimony that would have previously fallen within *Rimmasch's* scope—testimony based on novel scientific principles. Moreover, this Court held in *State v. Quintana* that *Rimmasch* does not apply to expert testimony about latent print analysis, because that analysis is not based on novel scientific principles.

Even if Defendant had requested a Rule 702 hearing, the State's expert testimony would have been admissible under that rule. None of the studies that Defendant cites establishes that latent print analysis is unreliable. Moreover, the methodology of latent print analysis is generally accepted and the federal courts have rigorously evaluated its reliability. None has found it to be unreliable.

II. The trial court did not abuse its discretion in excluding Defendant's expert, Simon A. Cole, Ph.D., or in limiting defense counsel's cross-examination of the State's expert. The trial court properly ruled that the subjects that Cole would have addressed could be adequately addressed on cross-examination. The Utah Supreme Court has held that issues involving latent print analysis can be fully addressed through cross-examination. Defense counsel also admitted that she could cover on cross-examination the points that Cole would address. Alternatively, Cole was not a qualified expert, because he had no training or experience in latent print analysis.

Nor did the trial court abuse its discretion in limiting defense counsel's cross-examination of the State's expert. Defense counsel was able to cross-examine on the subjects she wished to address, specifically: (1) the propriety of stating that the methodology of latent print analysis has a zero error rate, especially in light of reports

from professional organizations for latent print examiners advising members not to make that claim; and (2) whether the methodology can involve human error. Although the trial court did curtail defense counsel's attempts to ask follow-up questions, those limitations were appropriate because the points defense counsel sought to make were either only marginally relevant or cumulative.

Regardless, any error in excluding Cole's testimony or limiting defense counsel's cross-examination was harmless. Given Cole's lack of qualifications, he could not have testified that the bloody palmprint did not match Defendant, or opined on the accuracy of the analysis in this case. Moreover, defense counsel was able to establish through cross-examination that latent print analysis could not have a zero error rate and was subject to human error.

III. The Judgment and Sentence contains a clerical mistake regarding the amount of restitution imposed. It should be corrected to reflect an amount of $11,096.40, the total amount of restitution owing at sentencing.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED THE STATE'S EXPERT TESTIMONY ON LATENT PRINT ANALYSIS WITHOUT FIRST HOLDING A *RIMMASCH* HEARING

Defendant argues that the trial court was required to hold a *Rimmasch* hearing before admitting the State's expert testimony on latent print analysis, because various articles and studies have criticized the methodology of latent print analysis. Appellant's Br. at 16, 19-34. He contends that the prosecution could not have demonstrated that

latent print analysis satisfied *Rimmasch's* "heightened admissibility standard for novel scientific evidence." *Id.* at 16, 19-34.

The trial court denied Defendant's request for a *Rimmasch* hearing because this Court held in *State v. Quintana*, 2004 UT App 418, 103 P.3d 168, that *Rimmasch* did not apply to expert testimony based on the well-established scientific principles of latent print analysis. R.584:6-9, 17. The trial court's reasoning was correct. More fundamentally, however, the trial court did not abuse its discretion in denying the motion for a *Rimmasch* hearing, because amendments to rule 702, Utah Rules of Evidence, have replaced the *Rimmasch* test.

A. Amended Rule 702 has replaced the *Rimmasch* test.

Defendant asked the trial court to evaluate the admissibility of the State's expert testimony under the standard announced in *State v. Rimmasch*, 775 P.2d 388 (Utah 1989). R.216, 219-35. He did not ask the trial court to apply the standard in rule 702, Utah Rules of Evidence, which was amended before he filed his motion.[3] *Id.* Defendant recognized that Rule 702 "generally govern[s]" the admissibility of expert testimony. R.220. However, he asked the trial court to apply the *Rimmasch* standard because he believed that it provided a "more stringent test" than Rule 702. *Id.* He reasoned that the *Rimmasch* test applied because the State's "expert's testimony is based upon novel scientific techniques or principles" that can be reasonably questioned. R.220-22. The

[3] Rule 702, Utah Rules of Evidence, was amended effective 1 November 2007. Utah R. Evid. 702. Defendant filed his motion in April 2008. R.216-17.

trial court did not abuse its discretion in refusing to hold a *Rimmasch* hearing, because *Rimmasch* does not apply.

Before November 2007, Utah had two standards for evaluating the admissibility of expert testimony. Rule 702 "establishe[d] the general standard for the admissibility of expert testimony" based on technical or specialized knowledge, or well-established scientific principles. *Alder v. Bayer Corp.*, 2002 UT 115, ¶ 56, 61 P.3d 1068. However, "'where expert testimony [was] based upon *novel* scientific principles of techniques,'" *Rimmasch* "'imposed additional tests of admissibility' beyond the standard rules of evidence." *Id.* at ¶ 58 (quoting *Rimmasch*, 775 P.2d at 396) (emphasis in original); *see also Eskelson v. Davis Hosp. & Med. Ctr.*, 2010 UT 59, ¶ 10, 667 Utah Adv. Rep. 11 (recognizing that under the prior version of Rule 702, "the standard for determining the admissibility of technical or scientific expert testimony was that announced in *State v. Rimmasch*").

The November 2007 amendments to Rule 702 integrated the two standards into the new rule. *See Eskelson*, 2010 UT 59, ¶ 11 (recognizing that amended Rule 702 incorporates aspects of the *Rimmasch* test). The Utah Supreme Court has observed that "the *Rimmasch* test has been subsumed in the new rule" because the rule "incorporates an updated reliability analysis for expert testimony." *State v. Clopten*, 2009 UT 84, ¶ 38, 223 P.3d 1103.

Defendant asked the trial court to evaluate the admissibility of the State's expert testimony under *Rimmasch*, not Rule 702. R.216, 220. However, amended Rule 702 has

supplanted *Rimmasch*. *See Clopten*, 2009 UT 84, ¶ 38. Therefore, the trial court did not abuse its discretion in refusing to hold a *Rimmasch* hearing.

B. Even if the *Rimmasch* test survived the amendments to Rule 702, the trial court correctly denied the request for a *Rimmasch* hearing based on this Court's holding in *Quintana*.

Even if the *Rimmasch* test survived the amendments to Rule 702, the trial court correctly relied on this Court's holding in *State v. Quintana*, 2004 UT App 418, 103 P.3d 168, to conclude that *Rimmasch* does not apply to expert testimony on latent print analysis.

The *Rimmasch* test applies only to expert testimony based on "novel scientific principles or techniques." *Rimmasch*, 775 P.2d at 396. "*Rimmasch* . . . set the limits of its own application." *Alder*, 61 P.3d 1068, ¶ 58. "[T]he *Rimmasch* test was not intended to apply to all expert testimony. Rather, *Rimmasch* is implicated only when the expert testimony is 'based on newly discovered principles.'" *State v. Adams*, 2000 UT 42, ¶ 16, 5 P.3d 642 (quoting *Rimmasch*, 775 P.2d at 396).

In *Quintana*, this Court held that *Rimmasch* did not apply to expert testimony on latent fingerprint analysis, because "fingerprint analysis is not novel scientific evidence." 2004 UT App 418, ¶¶ 5-6. This Court observed that "[f]ingerprint identification has been admissible as reliable evidence . . . since at least 1911." *Id.* at ¶ 5 (quoting *United States v. Crisp*, 324 F.3d 261, 266 (4th Cir. 2003)).

Defendant argues that he was entitled to a *Rimmasch* hearing because the "'underlying principles'" of latent print analysis "'[have been] reasonably questioned.'" Appellant's Br. at 20 (quoting *Haupt v. Heaps*, 2005 UT App 436, ¶ 19, 131 P.3d 252).

He cites to "[r]ecent authoritative studies," including a report from the National Academy of Sciences entitled, *Strengthening Forensic Science in the United States: A Path Forward* (2009) (NAS Report), that criticize the reliability of latent print identification based on friction ridge analysis. *Id.* at 16-33. However, the test for determining whether *Rimmasch* applies was whether the expert testimony was based on "novel scientific principles or techniques," not whether the basis of the expert testimony had been criticized. *Rimmasch*, 775 P.2d at 396. *Quintana* established that *Rimmasch* does not apply to the well-established principles of latent print analysis. 2004 UT App 418, ¶¶ 4-6. Therefore, even if a *Rimmasch* hearing remains available under the new Rule 702, the trial court did not abuse its discretion in refusing to hold one. *See id.*

C. The State's expert testimony was admissible under Rule 702.

Even if Defendant had requested the trial court to evaluate the reliability of the State's expert testimony under Rule 702, the trial court would have found the testimony admissible.

1. The Rule 702 standard.

The current Rule 702 allows a qualified expert to testify in the form of an opinion based on reliable "scientific, technical, or other specialized knowledge," if that testimony "will assist the trier of fact." Utah R. Evid. 702(a). Analyzing the admissibility of expert testimony under Rule 702, "consists of two basic parts." *Clopten*, 2009 UT 84, ¶ 31. "First the trial judge must find that the expert testimony will 'assist the trier of fact.'" *Id.* (quoting Utah R. Evid. 702(a)). "Second, the testimony must 'meet a threshold showing' of reliability." *Id.* (quoting Utah R. Evid. 702(b)).

Rule 702 provides two ways to establish threshold reliability. *Id.* at ¶ 35. A party "may show that the 'principles or methods underlying the testimony meet a threshold showing that they (i) are reliable, (ii) are based upon sufficient facts or data, and (iii) have been reliably applied to the facts of the case.'" *Id.* (quoting Utah R. Evid. 702(b)). Or a party "may show that the underlying principles or methods 'are generally accepted by the relevant expert community.'" *Id.* (quoting Utah R. Evid. 702(c)).

The amendments to Rule 702 were not intended "to make it more difficult to admit expert testimony." *Eskelson*, 2010 UT 59, ¶ 11. The Utah Supreme Court has explained that while trial judges "should approach expert testimony with 'rational skepticism' . . . the 'degree of scrutiny . . . is not so rigorous as to be satisfied only by scientific or other specialized principles or methods that are free of controversy or that meet any fixed set of criteria fashioned to test reliability.'" *Id.* at ¶12 (quoting Utah R. Evid. advisory committee's note, ¶ 3). "Importantly," the Court has also observed that a party offering expert testimony need "make only a 'threshold showing' of reliability." *Id.* (quoting Utah R. Evid. 702(b)-(c)).

2. Expert testimony about latent print analysis is admissible under Rule 702.

Expert testimony based on latent print analysis is admissible under Rule 702. Given this Court's recognition in *Quintana* that latent print analysis is generally accepted, the testimony would have qualified for admissibility under subsection (c) of the rule. *See* Utah R. Evid. 702(c).

Even assuming that the various studies that Defendant cites were sufficient to call that general acceptance into question, those studies do not demonstrate that latent print analysis could not meet the threshold reliability showing under subsection (b). The NAS Report "did not conclude that fingerprint evidence was unreliable such as to render it inadmissible under Fed. R. Evid. 702." *United States v. Rose*, 672 F. Supp. 2d 723, 725 (D. Md. 2009). Rather, "[t]he NAS Report accepts as 'plausible' the proposition that 'a careful comparison of two impressions can accurately discern whether or not they had a common source.'" *Commonwealth v. Gambora*, 933 N.E.2d 50, 60 (Mass. 2010). The claimed weaknesses in latent print identification, according to the NAS Report, "are not new" and "speak more to an individual expert's application of the ACE-V method, rather than the universal reliability of the method."[4] *United States v. Cerna*, No. CR 08-0730 WHA, 2010 WL 3448528, at *7 (N.D. Cal. Sept. 1, 2010).

The co-chair of the NAS Report, Judge Harry Edwards from the D.C. Circuit Court of Appeals, "made it clear that nothing in the Report was intended to answer the 'question whether forensic evidence in a particular case is admissible under applicable law.'" *Rose*, 672 F. Supp. 2d at 725 (quoting Hon. Harry T. Edwards, Statement before U.S. Senate Judiciary Committee (Mar. 18, 2009)). Rather, the NAS Report "identified a need for additional published peer-reviewed studies and the setting of national standards in various forensic evidence disciplines, including fingerprint identification." *Id.* (citing NAS Report at 19-24). The Massachusetts Supreme Court reviewed the NAS Report and

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[4] "ACE-V" is an acronym for a latent print examiner's methodology. NAS Report at 137. It stands for "Analysis, Comparison, Evaluation, and Verification." *Id.*

concluded that "[u]ltimately, the report focuses on the need to prevent overstatement of the accuracy of fingerprint comparisons, and for additional research." *Gambora*, 933 N.E.2d at 59 (footnotes omitted). The NAS Report, therefore, does not establish that latent print analysis is unreliable.

Additionally, several federal courts have rigorously scrutinized the admissibility of latent print analysis under the Federal Rules of Evidence and none has found it to be unreliable. Federal district courts in the Third, Seventh, and Tenth circuits have all held *Daubert* hearings testing the reliability of latent print analysis.[5] *See United States v. Mitchell*, 365 F.3d 215, 222 (3rd Cir. 2004); *United States v. Havvard*, 260 F.3d 597, 598 (7th Cir. 2001); *United States v. Baines*, 573 F.3d 979, 981 (10th Cir. 2009). The hearing in *Mitchell* lasted five days and included testimony from eleven witnesses spanning nearly one thousand transcript pages. 365 F.3d at 222. All of those federal district courts found that latent print analysis was reliable under *Daubert*. *See Mitchell*, 365 F.3d at 229; *Havvard*, 260 F.3d at 599; *Baines*, 573 F.3d at 985. Those rulings were all affirmed on appeal. *See Mitchell*, 365 F.3d at 219; *Havvard*, 260 F.3d at 598; *Baines*, 573 F.3d at 980. The State could find no reported case in which a court has excluded latent print analysis as unreliable, nor does Defendant cite to one.[6]

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[5] The federal courts evaluate the reliability of expert testimony based on scientific evidence under the standard announced in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See State v. Crosby*, 927 P.2d 638, 641 (Utah 1996).

[6] Defendant attached to his 2008 motion for a *Rimmasch* hearing one undated, unsigned, unpublished memorandum decision from a Maryland trial court finding that the prosecution in that case had failed to prove that fingerprint evidence was reliable under Maryland's standard. R.245-60. However, in a 2009 opinion addressing the reliability of

If fingerprint evidence is admissible under *Daubert*, then it is also admissible under Utah's rule 702. The Utah Supreme Court has observed that the *Daubert* analysis is "similar to the standard" established in *Rimmasch*. *State v. Crosby*, 927 P.2d 638, 642 (Utah 1996). The amendments to Utah's Rule 702 that "subsumed" the *Rimmasch* test were "not intende[d] to make it more difficult to admit expert testimony." *Clopten*, 2009 UT 84, ¶ 38; *Eskelson*, 2010 UT 59, ¶ 11. Therefore, even if Defendant had asked the trial court to evaluate the reliability of latent print analysis under rule 702, the evidence would have been admissible.

3. Defendant waived any argument that palmprint analysis is distinguishable from fingerprint analysis.

Defendant argues that palmprint analysis is distinguishable from and less reliable than fingerprint analysis. Appellant's Br. at 33-35. However, Defendant affirmatively waived this argument below by telling the trial court that the two analyses are "substantially similar."

In his motion for a *Rimmasch* hearing, Defendant "acknowledge[d] that the process of identifying a latent palm print is substantially similar to the process of fingerprint identification." R.223 n.1. He therefore purposefully chose not to "specifically address[]" in his motion "any difference between palm prints and fingerprints." *Id.* Defendant cannot argue on appeal a distinction that he told the trial

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latent print analysis, the Maryland Court of Special Appeals makes no reference to that memorandum decision. *See Markham v. State*, 984 A.2d 262 (Md. Ct. Spec. App. 2009). Rather, the Maryland Court noted that "Appellant has cited to no case holding that fingerprint evidence based on the ACE-V method is not reliable. We have not been able to find any case so holding." *Id.* at 161.

court did not exist. *See State v. Maese*, 2010 UT App. 106, ¶ 9, 236 P.3d 155 ("'Affirmative representations that a party has no objection to the proceedings fall within the scope of the invited error doctrine because such representations reassure the trial court and encourage it to proceed without further consideration of the issues.'") (quoting *Newman v. White Water Whirlpool*, 2008 UT 79, ¶ 14, 197 P.3d 654).

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING DEFENDANT'S EXPERT WITNESS OR LIMITING DEFENSE COUNSEL'S CROSS-EXAMINATION OF THE STATE'S EXPERT

Defendant claims that the trial court denied him a fair opportunity to challenge the State's palmprint evidence because the court: (1) excluded his expert witness; and (2) unduly restricted his counsel's ability to cross-examine the State's expert. Appellant's Br. at 39-47. He argues that the trial court's actions "allowed" the jury to hear "inaccurate evidence regarding the fallibility of palm print evidence." *Id.* at 43.

On the contrary, the trial court properly exercised its discretion by excluding Defendant's expert testimony because defense counsel could adequately address the subjects of that testimony through cross-examination. Nor did the trial court unduly limit defense counsels' cross-examination. The trial court allowed defense counsel to cross-examine the State's expert about the fallibility of latent print analysis. From that questioning, the jury understood that latent print analysis cannot have a zero error rate and is subject to human error. Even if the trial court did err, any error was harmless because neither the proffered expert testimony, nor additional cross-examination, would

have raised a significant question about the accuracy of the latent print analysis in this case.

A. The trial court did not abuse its discretion by excluding testimony from Dr. Simon A. Cole.

Defendant argues that the trial court erroneously excluded his expert witness, Simon A. Cole, Ph.D., because the trial court erroneously believed that (1) Cole's testimony would be akin to expert testimony about eyewitness identification, and (2) Defendant could not challenge the reliability of latent print analysis at trial. Appellant's Br. at 40, 43 (quoting R.584:9-10). Defendant's claim fails because he misidentifies the basis for the trial court's ruling. The trial court excluded Cole's testimony because the court believed that defense counsel could adequately address on cross-examination the subjects that Cole would have addressed. Defendant fails to demonstrate how the trial court abused its discretion in making that ruling. Additionally, this Court can affirm on the alternative ground that Cole was not a qualified expert.

1. The trial court excluded Cole's testimony because it found that cross-examination could adequately cover the topics he would have addressed.

As stated, Defendant incorrectly identifies the reason that the trial court excluded Cole's testimony at trial. He argues that the trial court excluded Cole because it believed that: (1) his testimony would be akin to expert testimony on eyewitness identification; and (2) once it made a threshold determination that the State's expert testimony on latent print analysis was admissible, Defendant could not "present the finder of fact with

evidence undermining the reliability of the expert's testimony at trial." Appellant's Br. at 40, 43. Those were not the bases for the trial court's ruling.

Defendant asked to call Cole as a witness at the pretrial hearing on his motion for a *Rimmasch* hearing. R.584:9-10. It was at that hearing that the trial court refused to hear Cole's testimony because it believed that his testimony would be akin to expert testimony on eyewitness identification. *Id.* The trial later court told defense counsel at that hearing, "I might allow [Cole] to testify [at trial], to be quite honest with you." R.584:10.

Approximately three weeks after the hearing on his motion for a *Rimmasch* hearing, Defendant filed a motion to allow Cole to testify as an expert at trial. R.339-350. According to defense counsel, Cole would address "the fallibility of fingerprint evidence" by giving examples of "high profile cases of misidentification" involving fingerprints. R.586:12, 13. He would also address "the shortcomings of fingerprint identification" and the proposition that fingerprint analysis cannot have "a zero error rate." R.586:12-13, 16.

In a written opposition, the prosecution asserted that Cole was not a qualified expert. R.358. At the hearing on the motion, the prosecution also argued that Cole's testimony would be unnecessary because "[o]ur expert . . . is not going to say that there is a zero error rate." R.586:14. The prosecutor also argued that Cole's testimony would amount to "a *Rimmasch* hearing during the trial" on the legal question of the threshold reliability of latent print analysis. R.586:13-15. However, the prosecutor conceded that Defendant could call an actual latent fingerprint expert to testify at trial regarding

whether the State's expert used the correct method for analyzing the print evidence, or whether the State's expert made errors during her analysis. R.586:13-14.

The trial court excluded Cole's testimony. R.586:15. It concluded that the issue of whether "mistakes can be made" in fingerprint analysis could be adequately addressed through cross-examination. *Id.* The trial court told defense counsel, "you can cross-examine [the State's expert] on that." *Id.* Then, referring to this Court's reliance in *Quintana* on the Utah Supreme Court's holding in *State v. Hamilton*, 827 P.2d 232, 237 (Utah 1992), the trial court also explained, "I guess I have to go with what the Supreme Court said, and that is, we treat fingerprint evidence like any other evidence and do not evaluate its sufficiency to support a conviction by a separate or extraneous standard." R.586:15.

Contrary to Defendant's representation, the trial court excluded Cole's testimony because it concluded that defense counsel could adequately address the subjects of his testimony on cross-examination, and because the Utah Supreme Court has held that fingerprint evidence is not subject to special reliability problems that would require special treatment. R.586:15. Defendant fails to demonstrate how this ruling was an abuse of discretion.

2. The trial court did not abuse its discretion in ruling that Cole's testimony could be adequately covered on cross-examination.

The trial court did not abuse its discretion by excluding Cole's testimony on the basis that the topics he would cover could be effectively addressed through cross-examination of the State's expert. In fact, the trial court's ruling echoed what the Utah

Supreme Court has already observed—that "[q]uestions that go to the weight to be accorded fingerprint evidence are fairly obvious and straightforward and are subject to complete illumination through cross-examination and jury argument." *State v. Hamilton*, 827 P.2d 232, 237-38 (Utah 1992).

"'The trial court has wide discretion in determining the admissibility of expert testimony, and such decisions are reviewed under an abuse of discretion standard.'" *State v. Hollen*, 2002 UT 35, ¶ 66, 44 P.3d 794 (quoting *State v. Larsen*, 865 P.2d 1355, 1361 (Utah 1993)). Utah appellate courts will not reverse a decision to admit or exclude expert testimony "'unless the decision exceeds the limits of reasonability.'" *Id.* (quoting *Larsen*, 865 P.2d at 1361). Expert testimony is unnecessary where the topics of the expert's testimony can "be effectively elicited through cross-examination alone." *State v. Clopten*, 2009 UT 84, ¶ 32, 223 P.3d 1103; *see also State v. Walker*, 2010 UT App 157, ¶ 16, 235 P.3d 766 (holding that defense expert's "testimony was not critical because the defense was able to address [the same subject] by cross-examining the State's lay witnesses").

Defendant fails to demonstrate why Cole's testimony was necessary. He provides little detail about what Cole's testimony would have been. In his brief, he describes the testimony only in general terms. He asserts that Cole would have testified about "the fallibility of palm print evidence," "the reliability of the methods employed by the State's expert in reaching its [sic] conclusions and the reliability of palm print evidence in general[,]" and "studies undermining the reliability of print identification." Appellant's Br. at 40, 41, 43. In the trial court, defense counsel did not proffer any details of Cole's

testimony beyond explaining that he would testify about (1) instances of misidentification based on fingerprints; (2) "the shortcomings of fingerprint identification"; (3) the idea that fingerprint analysis cannot have a "zero error rate"; and (4) "the fallibility of fingerprint evidence." R.586:12-13.

Defendant fails to explain why these topics could not be adequately addressed through cross-examination. In fact, defense counsel admitted that she could cover these issues on cross-examination. She explained that she "[could] cross-examine [the State's] expert" about misidentifications involving fingerprints and the error rate for fingerprint analysis. R.586:12, 16.

Defendant claims only that the exclusion of Cole's testimony "allowed inaccurate evidence regarding the fallibility of palm print evidence to be heard by the jury." Appellant's Br. at 43. On the contrary, Cole's testimony was not necessary to give the jury an accurate picture regarding the fallibility of latent print analysis. As detailed more fully below, the jury understood that latent print analysis is not infallible. *See infra* Point II(C).

As stated, issues regarding the weight to be accorded fingerprint evidence "are subject to complete illumination through cross-examination and jury argument," *Hamilton*, 827 P.2d at 237-38. Here, defense counsel admitted that she could cover the subjects of Cole's testimony on cross-examination. Therefore, Defendant fails to demonstrate that the trial court's decision to exclude Cole's testimony "'exceed[ed] the limits of reasonability.'" *Hollen*, 2002 UT 35, ¶66 (quoting *Larsen*, 865 P.2d at 1361).

3. Cole was not qualified to opine on latent print analysis.

Alternatively, this Court can affirm on the basis that Cole was not an expert on latent print analysis. R.586:13. The prosecutor raised this argument in a memorandum opposing Defendant's motion to allow Cole to testify. R.358. The record demonstrates Cole's lack of qualifications. R.586:13. Therefore, this Court may affirm the trial court's decision on this alternate ground. *See State v. Henderson*, 2007 UT App 125, ¶ 15, 159 P.3d 397 ("an appellate court may affirm a trial court's judgment on an alternative ground . . . if the alternative ground is 'apparent on the record' and 'sustainable by the factual findings of the trial court'").

Under rule 702(a), Utah Rules of Evidence, a witness who gives an expert opinion must possess specialized "knowledge, skill, experience, training, or education." "'[T]he critical factor in determining the competency of an expert is whether that expert has knowledge that can assist the trier of fact in resolving the issues before it.'" *Evans ex rel. Evans v. Langston*, 2007 UT App 240, ¶ 9, 166 P.3d 621 (quoting *Depew v. Sullivan*, 2003 UT App 152, ¶ 42, 71 P.3d 601).

Defense counsel admitted that Cole had no "knowledge, skill, experience, training, or education" in the field of latent print analysis. Counsel explained that Cole "is not a latent fingerprint analysis expert" and that "[h]e doesn't analyze fingerprints." R.586:13. Rather, Cole "does . . . research about . . . the fallibility of fingerprint evidence." *Id.*

Cole has a Ph.D. in "Science & Technology Studies from Cornell University." R.274. His expert report explains that this field "uses the tools of the social sciences to study and understand how scientists produce knowledge." *Id.* He has authored a peer-

reviewed book and several articles on latent print identification. *Id.* However, Cole bases his opinions on his reading of "literature produced by the fingerprint profession," not on any study that he has conducted. R.274-76.

An expert must have "knowledge, skill, experience, training, or education" *in* the field on which he will opine. Utah R. Evid. 702(a). Knowledge *about* the field is not enough. For example, in *Patey v. Lainhart*, 1999 UT 31, ¶¶ 17-18, 977 P.2d 1193, an expert who practiced general dentistry was qualified to give an expert opinion about endodontics because he had knowledge, skill, experience, training, and education in endodontics. The expert testified "that one-fourth of his dental education related to endodontics; that he was licensed by the state to perform endodontic procedures; that he had maintained an ongoing education study of both general dentistry and endodontics . . . ; and that endodontics constituted a substantial portion of his 36-year practice." *Id.* at ¶ 18.

Conversely, in *Evans ex rel. Evans v. Langston*, 2007 UT App 240, ¶ 12, 166 P.3d 621, an anesthesiologist was not qualified to testify about whether a person died of coronary artery atherosclerosis. Although the witness had studied and practiced medicine, he was not a qualified to opine about heart disease because had no knowledge, skill, experience, education or training in the specific field of cardiology. *Id.*

Given his admitted lack of qualifications in this case, Cole could not opine about the specific issue before the jury—whether the pattern of the bloody latent palmprint matched Defendant's known print. R.586:13. Consequently, Cole was not qualified

under Rule 702 because he had no knowledge that could "assist the trier of fact in resolving the issues before it." *See Evans*, 2007 UT App 240, ¶ 9.

Other courts have excluded Cole's testimony on latent print analysis because he is not a qualified expert. For example, in *People v. Lugo*, No. B208806, 2009 WL 2025637, at *14 (Cal. Ct. App. July 14, 2009), the trial court excluded Cole's testimony because he was not qualified and his testimony was based entirely on hearsay. The California trial judge observed that Cole "just assails the reliability of prints . . . he goes to studies, and all he does is serve as a repository for hearsay based on articles that are written in various books." *Id.* The trial judge concluded that "Dr. Cole shouldn't be permitted to testify because he's not an expert. He's a general criminalist and really has never made a print comparison in his entire life." *Id.* The California Court of Appeal affirmed. *Id.* at *20.

Likewise, in *State v. Armstrong*, 920 So. 2d 769, 770-71 (Fla. Dist. Ct. App. 2006), the Florida District Court of Appeal held that Cole's testimony was excludable. That court observed: "While Dr. Cole has raised a general concern about the use of latent fingerprint identification analysis in courts across the United States, he has not related that concern to the fingerprint identification made in this case." *Id.* at 770. After noting Cole's lack of qualifications to testify about the "analysis actually performed in this case," the court held that his testimony was properly excluded because it "[would] not be

probative as to whether the latent prints lifted from the scene" matched the defendant's and therefore "[would] not be probative of the defendant's guilt or innocence."[7] *Id.*

The State does not dispute that Defendant could have called a witness with knowledge, experience, or training in latent print analysis to challenge the State's expert's testimony. The prosecutor acknowledged this below. R.586:13-14. However, Cole's testimony was excludable because he lacked these qualifications.

B. The trial court did not deny Defendant's right to confrontation by unduly limiting defense counsel's cross-examination.

Defendant also claims that the trial court prevented him from challenging the reliability of the State's expert testimony by limiting his counsel's cross-examination. Appellant's Br. at 39-44. He argues that the trial court unduly limited his counsel's ability to: (1) use various studies; and (2) ask the State's expert about whether "there is a zero error rate in fingerprint analysis" and whether "the analysis is not subjective." *Id.* at 42. He claims that these limitations denied him his constitutional right to confrontation. *Id.* at 39-44.

The record demonstrates, however, that the trial court allowed defense counsel to ask questions on the subjects that she wished to address, and overruled the prosecutor's objections to those questions. The trial court allowed defense counsel to cross-examine about the propriety of stating that latent print analysis has a zero error rate, and also

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[7] In *United States v. Mitchell*, 365 F.3d 215, 246, (3rd Cir. 2004), the Third Circuit observed that Cole and the other defense experts in that case "were undoubtedly qualified to offer their expert opinions." However, the Government did not challenge Cole's qualifications in that case. *Id.* at 222.

whether the analysis could involve human error. The trial court also allowed defense counsel to question the State's witnesses regarding reports from two professional organizations to which they belonged that advised members not to testify that the methodology has a zero error rate.

While the trial court did curtail defense counsel's follow-up questioning, and would not allow her to refer specifically to an FBI report, those limitations were appropriate and did not prevent defense counsel from making the points she wished to make. Based on defense counsel's cross-examination, the jury understood that latent print examination was fallible.

1. Proceedings below.

Defense counsel's proposed cross-examination. Before trial, and in anticipation of cross-examination, defense counsel presented the State's expert with a copy of two reports: the NAS Report, and an FBI report regarding the misidentification of Brandon Mayfield's fingerprints in the Madrid bombing case. R.589:47-49.

Defense counsel explained that she planned to use the NAS Report to counter any testimony that fingerprint analysis has a zero error rate, or that it does not have a subjective component. R.589:50, 120. She planned to use the FBI report to show that human error can occur in fingerprint analysis. R.589:50, 122-23.

Defense counsel also asked the trial court whether she could cross-examine the State's expert about reports from two professional organizations to which the State's expert belonged: the Scientific Working Group on Friction-ridge Analysis Study and Technology (SWGFAST) and the International Association for Identification (IAI).

R.589:51, 121-22. The two reports were issued in response to the NAS Report. *Id.* Defense counsel sought to use these reports to address anticipated testimony from the State's expert that "[fingerprint] analysis is not subjective, and that there is a zero methodology error rate." R.589:122.

The trial court agreed that defense counsel could question the State's witnesses based on the contents of the reports. R.589:50-53. The trial court agreed that defense counsel could ask the States' expert about error rates, and whether there is human error. R.589:50. The trial court also agreed that defense counsel could ask the State's expert "if she has received any recommendation from any organization that [she] ought not to be calling any findings that are made as zero errors—zero error rate." R.589:52.

But the trial court stated that defense counsel could not introduce any of the reports or refer specifically to the NAS and FBI Reports. R.589:50, 52-53. Defense counsel explained, however, "I don't intend to introduce [the reports]. All I want to do is ask [the State's expert] if she agrees." R.589:50. The trial court explained that it would not allow defense counsel to refer specifically to the Brandon Mayfield case, but would allow defense counsel to "ask [the State's expert] about whether there are errors, whether there is human error." *Id.*

The trial court reiterated that defense counsel could address on cross-examination the topics that she had identified. The trial court stated, "you can talk to [the State's expert] in general about whether there's human error and all this other stuff. " *Id.* The trial court wanted defense counsel to "keep it narrow" but gave her permission to "ask the questions in general." R.589:53.

Mr. Bugden asked whether he could proffer the reports as part of the record. R.589:116-17. The trial court refused, but allowed counsel to describe the reports in detail. R.589:117. Ms. Isaacson did so. R.589:120-26.

Trent Grandy. The State called Trent Grandy, a forensic scientist in the State Crime Lab, who processed and photographed the latent palm print on the bloody pillowcase. R.589:70-71, 78, 82-83, 91. On cross-examination, Grandy admitted that palmprint analysis comprised only about five percent of his work, compared to ninety-five percent for fingerprints. R.589:92. He explained that he used chemicals to process the latent print and the computer program "Photoshop" to enlarge and enhance the photo of the print. R.589:105. He admitted that "Photoshop" allowed him to "remove items or change items in the image." R.589:105.

Grandy also acknowledged on cross-examination that the notes he received with the evidence improperly indicated that the police had identified a "potential suspect" by relationship to the victim, but not by name. R.589:96-99. Grandy also admitted that the lab notes indicated that there had been some mislabeling of fingerprint cards. R.589:101, 165-66. He further acknowledged that although he originally believed that there was insufficient ridge detail to allow analysis of a latent print on one pillow, there was a "mix up" and he later discovered additional pillows. R.589:100-01. Grandy agreed that "there were some mistakes made by people who were working on the case." R.589:102.

The trial court allowed defense counsel to cross-examine Grandy about recommendations from the SWGFAST and IAI. R.589:106-09. After confirming that he belonged to the IAI, defense counsel asked Grandy whether he was aware that the

organization had "made a recommendation that its members not assert 100 percent infallibility or zero error rate when addressing the reliability of fingerprint comparisons." R.589:107. Although the prosecutor objected, the trial court overruled the objection, stating, "He can say yes or [no]." *Id.* Grandy initially responded, "Yes," that he was aware that "there was a letter written in response to a request for information." *Id.*

However, when defense counsel re-asked whether Grandy was aware that the organization recommended that members "do not assert a zero error rate," Grandy replied, "I don't know—I can't really answer yes or no to that, because I'm not sure what that means by zero error rate. I'm not sure what they're referring to." R.589:108. The trial court then stated, "Then let's stop. . . . Get on to something else." *Id.*

Defense counsel then confirmed that Grandy was a member of SWGFAST and asked whether he was aware that that organization "acknowledge[d] that errors do occur, and . . . that claims of zero error rate in the discipline are not scientifically plausible." R.589:108. Grandy responded, "No, I'm not aware of that." *Id.* When defense counsel tried to follow up, the trial court interjected: "Wait a minute, don't argue with him. He said he's not aware of it. Leave it alone." R.589:109.

On redirect examination, the prosecutor asked whether errors are made in print identification. R.589:112. Grandy testified that to his knowledge, he personally had "never made an error" in the actual analysis and comparison of print evidence. R.589:113. He acknowledged that he had made an error in this case by not initially realizing that there were other pillows to analyze, but he did not believe that the error affected the accuracy of the print analysis. R.589:112-13.

On recross-examination, defense counsel asked Grandy whether he had ever made a mistake in comparing fingerprints. R.589:113-14. Grandy responded that, to his knowledge, he had "never made a bad identification." R.589:114.

Elisa Macken-Farmer. Elisa Macken-Farmer, a senior forensic scientist at the State Crime Lab, performed the actual palmprint comparison in this case. R.589:127, 142-43. Based on her analysis, she testified that the bloody latent palmprint "was identified to" Defendant, meaning that the latent print matched Defendant's known inked print. R.589:155. Farmer found thirteen matching characteristics between the two prints, but marked only ten on the State's exhibit so as not to overly clutter it. *Id.*; State's Exhibit 38. She testified that the clarity of the ridges in the latent print scored a "4 or 5" on a scale where a score of 1 represented the most clear, and 10 the least clear. R.589:139-40, 156-57. Farmer's analysis also excluded Michael Thompson and Foote as the source of the latent print. R.589:155-56. Farmer conducted her print analysis in October 2007. R.589:143-44.

On cross-examination, Farmer acknowledged that she knew Defendant was listed as the suspect when she conducted her analysis. R.589:160. She also acknowledged that Grandy had used "Photoshop" in processing the photo of the bloody latent print. R.589:162. Farmer acknowledged that a latent print can be smudged when it is left on a surface and that chemicals can affect the quality of a latent print. R.589:163. She also acknowledged that some of the print cards had been mislabeled. R.589:165-66.

Farmer also acknowledged that she was a member of the IAI and that they had issued a report in February 2009. R.589:168-69. Defense counsel asked Farmer whether

she was aware that the report recommended that IAI members "not assert 100 percent infallibility or a zero error rate when talking about the reliability of fingerprint comparisons." R.589:169. When the prosecutor objected to the question, the trial court overruled the objection, explaining that Farmer could "answer yes or no." *Id.* Farmer responded, "Yes, that's a new statement." *Id.* Defense counsel then asked whether Farmer was aware that the statement also advised IAI "members to avoid stating their conclusions in absolute terms when dealing with population issues." *Id.* Farmer responded, "Yes." R.589:169-70.

When defense counsel asked whether Farmer agreed that the IAI Report advised members "We don't want you to say this is 100 percent reliable," the prosecutor objected. R.589:170. The trial court overruled the objection. *Id.* Farmer replied that the term "reliable" was "not the right word for that" and started to explain her answer. *Id.* Defense counsel then interrupted, stating, "Well, listen to my—." *Id.* The trial court interjected, saying "Well, don't interrupt her. You've asked the question. She doesn't agree with what it says. She, I assume, interprets it in some other way, right, or wrong?" *Id.* Farmer then replied, "I feel the need to explain it a little further." *Id.* The trial court then stated, "Well, we're not going to talk about it." *Id.*

Defense counsel did not relent, explaining, "Well, my only question to her is whether or not she agrees that this is what they've stated." *Id.* Farmer replied, "Yeah. I mean that is what they've stated." *Id.*

Defense counsel then asked Farmer about the SWGFAST report. R.589:170-71. Farmer acknowledged that she was aware of a report issued in August 2009. R.589:171.

When defense counsel attempted to ask her next question the trial court interjected saying, "Okay. She's aware of it, but we're not going any further with it. If you'll recall, she did her work in 2007, right?" *Id.* The trial court explained, "We're going to end it right there." *Id.*

On redirect examination, the prosecutor asked whether Farmer understood "that there can be human error when it comes to fingerprint analysis." R.589:172. Farmer responded, "Yes." *Id.* The prosecutor then asked what Farmer's personal error rate was. *Id.* She responded "Zero." *Id.* Farmer explained that, to her knowledge, she had never "made a bad ID in a case" and had perfect scores on her annual proficiency tests. *Id.*

Closing argument. During closing argument, defense counsel emphasized the IAI and SWGFAST recommendation "that technicians should not say that there's a zero error rate." R.590:166. On rebuttal, the prosecutor clarified that "[n]obody is saying there's a zero error rate. Clearly people make mistakes." R.590:170.

2. Defendant has not shown that the trial court's limits on cross-examination amounted to a violation of his right to confrontation.

"'A defendant's right of confrontation 'is not without limitation' and 'may . . . bow to accommodate other legitimate interests in the criminal trial process.'" *State v. Hamblin*, 2010 UT App 239, ¶ 22, 239 P.3d 300 (quoting *Michigan v. Lucas*, 500 U.S. 145, 149 (1991)). "The right 'guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Id.* (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (emphasis in original)). "[T]rial judges retain wide latitude insofar as the Confrontation

Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things . . . confusion of the issues . . . or interrogation that is repetitive or only marginally relevant. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

Defendant fails to show that the trial court improperly limited his counsel's opportunity for cross-examination. Defense counsel sought to cross-examine on two topics: (1) that the methodology of latent print analysis cannot have a zero error rate and latent print examiners have been instructed not claim that it does; and (2) that latent print analysis is subjective and may involve human error. As demonstrated above, the trial court gave defense counsel permission to question both of the State's Crime Lab witnesses on these topics and counsel in fact did.

The trial court would not allow counsel to refer specifically to the NAS or FBI Reports. However, Defense counsel did not wish to introduce the reports and only wanted to ask if the State's expert agreed with their contents. R.589:50. The trial court allowed defense counsel to do so, explaining that counsel could ask "about whether there are errors, whether there is human error" and "if she has received any recommendation from any organization that you ought not to be calling any findings that are made as zero errors—zero error rate." R.589:50, 52. Those were the topics from the reports that defense counsel wished to address. R.589:50-52, 120-23.

The trial court also would not allow defense counsel to refer specifically to the Brandon Mayfield case. R.589:52-53. However, whether the FBI Lab had misidentified a fingerprint in that case was irrelevant, or, at best, only marginally relevant to the

accuracy of the Utah Crime Lab's analysis in this case. The FBI lab did not perform the analysis in this case and Defendant presented no evidence that any of the specific factors that led to the FBI Lab's misidentification were present in this case. Therefore, this was a proper limitation on the scope of cross-examination. *See Van Arsdall*, 475 U.S. at 679 (allowing reasonable limitations on cross-examination to avoid "confusion of the issues . . . or interrogation that is repetitive or only marginally relevant"). In any event, the trial court allowed defense counsel to ask the State's expert "whether there is human error" in fingerprint analysis. R.589:50.

Finally, although the trial court allowed defense counsel to refer to the recommendations from the IAI and SWGFAST in questioning the State's Crime Lab witnesses, the trial court also curtailed defense counsel's follow-up questions regarding those recommendations. But this did not prevent defense counsel from conveying to the jury the fact that these professional organizations to which the State's Crime Lab witnesses belonged had advised their members not to testify that the methodology of latent print analysis has a zero error rate.

Trent Grandy did not acknowledge the recommendations from the IAI and SWGFAST, and the trial court did not allow defense counsel to follow up with him. However, the content of the reports from both organizations was clear from defense counsel's questions—both recommended that "members not assert 100 percent infallibility or zero error rate when addressing the reliability of fingerprint comparisons[.]" R.589:107.

Elisa Macken-Farmer did acknowledge that the IAI had issued a report advising that its members "not assert 100 percent infallibility or a zero error rate." R.589:169. She also acknowledged that the report advised "members to avoid stating their conclusions in absolute terms when dealing with population issues." R.589:169. Farmer also agreed that the report advised members "We don't want you to say this is 100 percent reliable." R.589:170.

The trial court would not allow defense counsel to question Farmer about the recommendations in the SWGFAST report beyond having Farmer acknowledge the report. R.589:171. However, those questions would have been cumulative. Based on the questions to both Grandy and Farmer, the jury understood that the recommendations from both organizations were the same. Farmer acknowledged the recommendations in the IAI report and also acknowledged that SWGFAST had also issued a report. Limiting cumulative cross-examination is within a trial court's "wide latitude" to impose reasonable limits on cross-examination. *See Van Arsdall*, 475 U.S. at 679.

In short, although the trial court imposed some limits on defense counsel's cross-examination, none prevented counsel from addressing the issues that she wished to address—that latent print analysis is subject to human error and cannot have a zero error rate. Therefore, the trial court did not abuse its discretion in limiting defense counsel's cross-examination. *See id.*

C. Any error in excluding Cole's testimony, or in limiting defense counsel's cross-examination, was harmless.

Defendant argues that any error in excluding Cole's testimony or limiting his counsel's cross-examination "allowed" the jury to hear "inaccurate evidence regarding the fallibility of palm print evidence." Appellant's Br. at 43. He argues that this error was harmful because the palmprint evidence was critical to the State's case. Appellant's Br. at 44-47.

The State does not dispute that the palmprint evidence was critical. However, the jury did not hear inaccurate evidence about the fallibility of palmprint analysis. Additionally, neither Cole's testimony, nor additional cross-examination, would have caused the jury to reject the State's expert's conclusion that the bloody palmprint matched Defendant. Therefore, any error in excluding Cole's testimony was harmless and any error in limiting defense counsel's cross-examination, assuming that it amounted to a denial of Defendant's confrontation rights, was harmless beyond a reasonable doubt.

1. Any error in excluding Cole's testimony was harmless.

Even if the trial court abused its discretion in excluding Cole's testimony, any error was harmless. An erroneous exclusion of expert testimony is "harmful only if there is a 'reasonable likelihood' that the verdict would have been different had the expert testimony been included." *State v. Clopten*, 2009 UT 84, ¶ 39, 223 P.3d 1103 (quoting *Steffensen v. Smith's Mgmt. Corp.*, 862 P.2d 1342, 1347 (Utah 1993)). Thus, erroneous exclusion of expert testimony is harmless where the expert's testimony, even if believed, "would not necessarily establish [the defendant's] innocence." *State v. Barber*, 2009 UT

App 91, ¶ 33, 206 P.3d 1223. Here, any error in excluding Cole's testimony was harmless because his testimony would not have created a reasonable probability that the jury would reject the State's expert testimony that the bloody palmprint was his.

Because Cole had no experience in actual latent print analysis he could not testify that the bloody palmprint on Foote's pillow was not Defendant's. He could not opine whether the State's expert had correctly performed her analysis, or whether she reached an accurate result.

Moreover, Cole's testimony about general "shortcomings" of latent print analysis would have had little impact. Cole has identified only 22 verified cases—in the United States and Great Britain combined—of fingerprint misidentification since 1920. *See* Simon A. Cole, *More Than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 J. Crim. L & Criminology 985, 991 (2005).

His testimony that the ACE-V method cannot have a zero error rate would have been equally inconsequential because the jury was aware of this issue and still convicted. None of the State's witnesses claimed that the ACE-V method has a zero error rate. Additionally, defense counsel's cross-examination made it clear that professional organizations for latent print examiners had advised members against claiming that the methodology has a zero error rate. The State's expert also admitted that latent print analysis can involve human error. R.589:172.

Cole's testimony would not have created a reasonable probability that the jury would have rejected the State's expert's conclusion and acquitted Defendant. Cole could not have opined about the accuracy of the analysis in this case and the jury was also

aware of the general critiques of latent print analysis that he would have identified. Therefore, any error in excluding Cole's testimony was harmless. *See Clopten*, 2009 UT 84, ¶ 39.

2. Any error in limiting defense counsel's cross-examination was harmless beyond a reasonable doubt.

Even assuming that the trial court abused its discretion in imposing some limits on cross-examination, Defendant fails to demonstrate that these limitations rose to the level of a constitutional violation. Not every evidentiary ruling that limits cross-examination amounts to a violation of the right to confrontation. *See State v. Hackford*, 737 P.2d 200, 204-05 (Utah 1987) (recognizing that "evidentiary standards and the constitutional guarantee [of confrontation] are not and ought not to be entirely coextensive"). While Defendant identifies limitations on his counsel's cross-examination, he fails to explain why these rose to the level of a constitutional violation, especially where defense counsel still was able to address the topics that she desired.

In any event, assuming, arguendo, that any error in limiting defense counsel's cross-examination amounted to a violation of Defendant's right to confrontation, the error was harmless beyond a reasonable doubt. In making this assessment, this Court "must determine 'whether, assuming that the damaging potential of cross-examination [had been] fully realized,' the error was nonetheless 'harmless beyond a reasonable doubt.'" *State v. Chavez*, 2002 UT App 9, ¶ 17, 41 P.3d 1137 (quoting *Van Arsdall*, 475 U.S. at 684 (alteration in original)).

In this case, additional cross-examination would not have given the jury any new reason to question the State's expert testimony. Although defense counsel was not allowed to refer specifically to the Brandon Mayfield case, the State's expert agreed that "there can be human error when it comes to fingerprint analysis." R.589:172. Moreover, the trial court allowed defense counsel to question the State's Crime Lab witnesses about the IAI and SWGFAST reports. Despite the limitations on defense counsel's ability to ask follow-up questions regarding those reports, the jury understood that both organizations had told their members not to testify that the ACE-V analysis has a zero error rate. Ms. Farmer, who performed the actual palmprint analysis, directly acknowledged the recommendation from the IAI. Finally, in closing argument, defense counsel emphasized the recommendations against claiming a zero error rate. R.590:166. The prosecutor agreed, stating in rebuttal closing that "[n]obody is saying there's a zero error rate." R.590:170. She also acknowledged, "[c]learly people make mistakes." *Id.*

Given what the jury did hear, additional cross examination on the issue of zero error rate, or whether latent print examination can be subject to human error, would not have undermined the State's expert testimony to the point that the jury would have rejected that testimony. Therefore, any error in limiting defense counsel's cross-examination was harmless beyond a reasonable doubt. *See Chavez*, 2002 UT App 9, ¶ 17.

III. THE JUDGMENT AND SENTENCE CONTAINS A CLERICAL MISTAKE IN THE RESTITUTION AMOUNT THAT SHOULD BE CORRECTED

Defendant states that the Judgment and Sentence contains a clerical mistake in the restitution amount because the amount listed in the order differs from the amount the trial court imposed at the sentencing hearing. Appellant's Br. at 47-49. He argues that the trial court only ordered $10,436.40 in restitution. *Id.* at 48. The State agrees that there is a clerical error in the Judgment and Sentence, but submits that the correct restitution amount should be $11,096.40.

At sentencing, the trial court observed that Foote and her son were in ongoing therapy. R.591:60. The judge therefore decided to leave restitution open for six months. *Id.* However, the judge noted that a letter from the Office of Crime Victim Reparations listed payments totaling $10,436.40 to Foote. *Id.* The trial court explained that he would "order that" as restitution for the time being, but leave the total amount open for six months. *Id.*

The signed Judgment and Commitment, entered just one day after the sentencing hearing, imposes $41,469.00 in restitution. R.567. But the record contains no evidence regarding additional restitution accruing after the sentencing hearing.

The State agrees that the signed Judgment and Commitment contains an incorrect restitution amount. But the correct amount should be $11,096.40, not $10,436.40. The higher amount is correct because the trial court overlooked a second letter from the Office of Crime Victim Reparations that listed additional payments.

The record contains two letters from the Office of Crime Victim Reparations, both dated 22 September 2009. R.558. The letters are stapled to the Victim Impact Statement.[8] *Id.* The first letter lists payments totaling $10,436.40—the amount the trial court stated at sentencing. R.558, 591:60. The second letter details an additional payment of $660.00. R.558. Combined, the letters detail payments totaling $11,096.40. *Id.* The trial court apparently overlooked the second letter. The Pre-Sentence Investigation Report recommends restitution for the full $11,096.40 paid by Crime Victim Reparations. R.557 (PSI at 20).

While the $41,469.00 amount listed in the Judgment and Commitment is incorrect, so is the $10,436.40 amount that the trial court stated at sentencing. Nothing in the record indicates that the trial court intended to impose anything less than full restitution. The failure to include the $660.00 listed in the second letter was simply an oversight.

Rule 30(b), Utah Rules of Criminal Procedure, provides that "[c]lerical mistakes in judgments . . . arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court may order." This Court should remand the case to the trial court to correct the clerical error in the Judgment and Commitment. *See id.* The Judgment and Sentence should be corrected to impose $11,096.40 in restitution.

CONCLUSION

For the foregoing reasons, the Court should affirm Defendant's conviction, but remand the case for the limited purpose of correcting the clerical error in the restitution amount stated in the Judgment and Sentence.

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[8] These documents are contained in a white envelope paginated as R.558.

Respectfully submitted 10 November 2010.

MARK L. SHURTLEFF
Utah Attorney General

CHRISTOPHER D. BALLARD
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on 10 November 2010 four accurate copies of the foregoing brief were ☑ mailed ☐ hand-delivered to:

Debra M. Nelson
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 300
Salt Lake City, UT 84111

A digital copy of the brief was also included: ☑ Yes ☐ No

Addenda

Addendum A

U.S. CONST. amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Utah R. Evid. 702

(a) Subject to the limitations in subsection (b), if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

(b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony if the scientific, technical, or other principles or methods underlying the testimony meet a threshold showing that they (i) are reliable, (ii) are based upon sufficient facts or data, and (iii) have been reliably applied to the facts of the case.

(c) The threshold showing required by subparagraph (b) is satisfied if the principles or methods on which such knowledge is based, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.

[Amended effective November 1, 2007.]

Advisory Committee Note

Apart from its introductory clause, part (a) of the amended Rule recites verbatim Federal Rule 702 as it appeared before it was amended in 2000 to respond to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The 2007 amendment to the Rule added that introductory clause, along with parts (b) and (c). Unlike its predecessor, the amended rule does not incorporate the text of the Federal Rule. Although Utah law foreshadowed in many respects the developments in federal law that commenced with Daubert, the 2007 amendment preserves and clarifies differences between the Utah and federal approaches to expert testimony.

The amended rule embodies several general considerations. First, the rule is intended to be applied to all expert testimony. In this respect, the rule follows federal law as announced in Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). Next, like its federal counterpart, Utah's rule assigns to trial judges a "gatekeeper"

responsibility to screen out unreliable expert testimony. In performing their gatekeeper function, trial judges should confront proposed expert testimony with rational skepticism. This degree of scrutiny is not so rigorous as to be satisfied only by scientific or other specialized principles or methods that are free of controversy or that meet any fixed set of criteria fashioned to test reliability. The rational skeptic is receptive to any plausible evidence that may bear on reliability. She is mindful that several principles, methods or techniques may be suitably reliable to merit admission into evidence for consideration by the trier of fact. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical", but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education". Finally, the gatekeeping trial judge must take care to direct her skepticism to the particular proposition that the expert testimony is offered to support. The Daubert court characterized this task as focusing on the "work at hand". The practitioner should equally take care that the proffered expert testimony reliably addresses the "work at hand", and that the foundation of reliability presented for it reflects that consideration.

Section (c) retains limited features of the traditional Frye test for expert testimony. Generally accepted principles and methods may be admitted based on judicial notice. The nature of the "work at hand" is especially important here. It might be important in some cases for an expert to educate the factfinder about general principles, without attempting to apply these principles to the specific facts of the case. The rule recognizes that an expert on the stand may give a dissertation or exposition of principles relevant to the case, leaving the trier of fact to apply them to the facts. Proposed expert testimony that seeks to set out relevant principles, methods or techniques without offering an opinion about how they should be applied to a particular array of facts will be, in most instances, more eligible for admission under section (c) than case specific opinion testimony. There are, however, scientific or specialized methods or techniques applied at a level of considerable operational detail that have acquired sufficient general acceptance to merit admission under section (c).

The concept of general acceptance as used in section (c) is intended to replace the novel vs. non-novel dichotomy that has served as a central analytical tool in Utah's Rule 702 jurisprudence. The failure to show general acceptance meriting admission under section (c) does not mean the evidence is inadmissible, only that the threshold showing for reliability under section (b) must be shown by other means.

Section (b) adopts the three general categories of inquiry for expert testimony contained in the federal rule. Unlike the federal rule, however, the Utah rule notes that the proponent of the testimony is required to make only a "threshold" showing. That "threshold" requires only a basic foundational showing of indicia of reliability for the testimony to be admissible, not that the opinion is indisputably correct. When a trial court, applying this amendment, rules that an

expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. Contrary and inconsistent opinions may simultaneously meet the threshold; it is for the factfinder to reconcile—or choose between--the different opinions. As such, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert, and it is not contemplated that evidentiary hearings will be routinely required in order for the trial judge to fulfill his role as a rationally skeptical gatekeeper. In the typical case, admissibility under the rule may be determined based on affidavits, expert reports prepared pursuant to Utah R.Civ.P. 26, deposition testimony and memoranda of counsel.

Utah R. Evid. 703

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Utah R. Crim. P. 30

(a) Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded.

(b) Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court may order.

Addendum B

THIRD JUDICIAL DISTRICT COURT

FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, PLAINTIFF, VS. ROBERT MICHAEL SHEEHAN, DEFENDANT.	Civil No. 061908535 MOTION HEARING

BEFORE THE HONORABLE WILLIAM W. BARRETT

SCOTT M. MATHESON COURTHOUSE
450 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84111

JULY 2, 2008

REPORTED BY: Vicky McDaniel 20090913-CA

UTAH 20090913-CA

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July 2, 2008

P R O C E E D I N G S

* * *

THE COURT: Good morning. This is State of Utah vs. Robert Sheehan, Case No. 061908535. May I have appearances, please?

MS. ISAACSON: Tara Isaacson and Walter Bugden for Mr. Sheehan, who's present.

MS. COOK: Alicia Cook and Michaela Andruzzi for the State.

THE COURT: Okay. This is what I have before me, and I don't know what everybody's anticipated here. So I'm going to read it. This is a motion for Rimmasch hearing to determine the admissibility of partial palm print evidence. So we're going to decide whether we're going to have the hearing.

Are you ready to go?

MS. ISAACSON: Yes.

THE COURT: Okay.

MS. ISAACSON: Well, your Honor in 2004 the Court of Appeals decided in State v. Quintana that fingerprint evidence was basically reliable, and so Rimmasch did not apply. It's our position that since 2004 a lot of things have changed.

Number one, a number of high profile misidentifications have come to light. Quintana also involved, as you'll note in footnote 1, I believe, that was a case where

it was a time when fingerprint analysis was being done differently. And in that case the minimum amount of matching characteristics was ten. In that case there were 14.

In this case you'll hear testimony from the lab and from Mr. Cole --

THE COURT: I'm not going to hear testimony until I make a determination.

MS. ISAACSON: If you were to hear testimony, your Honor, you will hear testimony simply that Ms. Macken and her office made a determination that there was a match. They're not going to talk to you about the number of loci matches or certain characteristics of matches. They're just going to say it was a match. That's different from what was before the court in the Court of Appeals in Quintana.

Furthermore, since that time a number of jurisdictions, we presented you with those cases, have determined that fingerprint evidence should be excluded in certain cases. We believe that, number one, fingerprint evidence has not generally been accepted by the scientific community. It's true that the courts have said we accept it.

THE COURT: As I recall, it's like a hundred years for acceptance.

MS. ISAACSON: It is a hundred years.

THE COURT: That's a long time.

MS. ISAACSON: A hundred years is a long time. But

for a hundred years, we believed that eyewitness identification was --

THE COURT: No, we're not talking about eyewitness identification. I'm familiar with the long instruction and all that other stuff. I think we're comparing apples and oranges, to be quite honest.

MS. ISAACSON: Well, let me tell you what the three things are that we're asking you to consider, and perhaps that will affect your decision here today.

THE COURT: It might.

MS. ISAACSON: Number one, our first request is that you exclude the evidence completely.

Number two, we're asking that you give a cautionary instruction as recommended by Judge Thorne in Quintana in the concurrent opinion.

In the alternative and in addition, we're asking that the Court limit the fingerprint examiner to the testimony that this print was consistent with Mr. Sheehan's print, not that it's a match. We believe that the fact that most fingerprint examiners use the term "match" is prejudicial and that it's not consistent with science. And the idea that the latent print examiner would be permitted to testify that there is a zero error rate is improper.

So we're asking for those three alternatives. You may see to me, based upon Quintana, I'm not going to talk about

exclusion; but I am going to talk about -- but you may be willing to consider a limiting instruction and limiting what the examiner can say.

And before you -- before you say Quintana has decided the issue, I would ask the Court to please give us some leeway to present Dr. Simon Cole, who's here from California, who is an expert on the subject --

THE COURT: And I don't believe I'm going to have somebody tell me that it's no good. See, this is my view of Quintana: it's the law in the State of Utah; and I'm bound by that law. And unfortunately, what is it, about a three-page opinion, and that's the tragedy of it all. Maybe they should have evaluated this in a little bit more detail. My presumption is, though, they've heard the same arguments or similar arguments that you're making to me today. And I believe that I am bound by Quintana.

So really what we're going to be looking at, I think, and I'm going to give Ms. Cook an opportunity to argue her side of the story, or whoever is going to make that argument, but that's kind of where I am right now. So --

MS. ISAACSON: Well, your Honor, with respect to Quintana, again --

THE COURT: I've read through -- I've had somebody help me, and we've gone through your memos, and you cite the studies and a variety of other things. That's all well and

good, and you may very well be right. But I'm not sure it's up to me to make that decision because of Quintana.

MS. ISAACSON: Well, as a matter of the record, your Honor --

THE COURT: Sure.

MS. ISAACSON: -- I would ask your indulgence in permitting us to at least make a record with Dr. Simon Cole.

THE COURT: No, I don't think so.

MS. ISAACSON: Well, in the State v. Quintana case, we don't know what was presented. All they talked about --

THE COURT: I know what the law is, and it's right here in this case. "However, we conclude that fingerprint identification is not novel scientific evidence," they say that. They quote the Supreme Court, "We treat fingerprint evidence like any other evidence. Thus the Supreme court clearly indicated that fingerprint evidence is not subject to reliability problems sufficient to justify special treatment."

That's the law in the State of Utah.

MS. ISAACSON: But your Honor --

THE COURT: I know you disagree with me.

MS. ISAACSON: I'm asking to be given the opportunity to make a record. If -- the key for Rimmasch is that we need to demonstrate to you that this evidence --

THE COURT: We're not going to have a Rimmasch hearing because we're -- that's the threshold question.

MS. ISAACSON: And I understand that we are only entitled to a Rimmasch hearing if we demonstrate to you that fingerprint evidence has not been generally accepted in the scientific community.

THE COURT: Well, I've got a case that says it's okay.

MS. ISAACSON: I understand, your Honor.

THE COURT: And you're asking me to say, well, the Court of Appeals is wrong, and I'm not going to do that.

MS. ISAACSON: And the reason why --

THE COURT: Listen to me. I'm not going to do that.

MS. ISAACSON: I'm hearing you.

THE COURT: Okay.

MS. ISAACSON: But just for the purposes of the record, I want to just make clear what we were hoping to do, what we would like to do --

THE COURT: I know what you were hoping to do. You made it very clear in your memos. But in my mind, the threshold question is whether we have the hearing, and I think that Quintana tells me that there's not a need for a hearing.

MS. ISAACSON: But I don't think Quintana precludes you from having a hearing.

THE COURT: But I don't -- no, I think it does. Because they say I don't need to do it. Now, why would I do it if I don't need to?

MS. ISAACSON: Again, your Honor, it's --

THE COURT: What I'm willing to do, I think there were some presumptions made here about this hearing, but, you know, it's very narrow. It's a motion to determine whether a hearing should be had. And under Quintana, I'm telling you, I don't think I need to have one. But I'm certainly willing to consider at least a cautionary instruction.

MS. ISAACSON: But you're not -- just so we're clear: I'm not arguing with you, Judge.

THE COURT: Yes, you are, but that's okay.

MS. ISAACSON: Just so we're clear: you're not wanting to hear --

THE COURT: No.

MS. ISAACSON: -- from Dr. Cole?

THE COURT: No, I don't need to. I don't need to get to there. That's a Rimmasch hearing, but I don't need to get there. With all due respect to your expert, I don't need to get there.

MS. ISAACSON: With respect to the cautionary instruction and a limiting of the examiner to use the term "consistent," I believe that Dr. Cole could assist with respect to this consistency issue.

THE COURT: No, it's kind of like people who want to bring in an expert to tell me all about eyewitness testimony or to tell the jury about eyewitness testimony. I wouldn't allow

that. I'll give the instruction, let the jury decide.

MS. ISAACSON: So is the Court also indicating that with respect to trial, Dr. Cole will not be permitted to --

THE COURT: I might allow him to testify, to be quite honest with you.

MS. ISAACSON: At trial?

THE COURT: I might. I haven't thought about that. I didn't reach that point. And I'm sure the State has something they might want to say about it, but I've thought about it.

MS. ISAACSON: Is there anything I can say to persuade you that the Rimmasch hearing would be appropriate?

THE COURT: No.

MS. ISAACSON: I guess we'll hear from the State on this issue, and then if we could talk about the limiting instruction, I would appreciate that.

THE COURT: Okay.

MS. COOK: Good morning, your Honor.

THE COURT: Good morning.

MS. COOK: Well, the Court has set the right analysis. We have a case from 2004, State v. Quintana, which actually addressed all of these issues. And we know what that Court looked at, because I submitted a copy of the brief relied upon by the defendant in his appeal.

And the different issues that were raised in that

argument are the fact that no research has ever established the permanence and uniqueness of fingerprints, so that issue was looked at by our Court of Appeals. That no testing has ever supported the validity or reliability of fingerprint evidence, so that argument was considered by our Court of Appeals. The absence of error rates seriously undercuts the validity of fingerprint identification. That issue looked at, considered, rejected by the Court of Appeals. And the absence of standards identifying fingerprints constitutes a subjective process which is fraught with error, potential for abuse.

And we know these are similar issues to what Dr. Cole would be testifying about, because we have seen his expert report.

Your Honor, there is no new information here. These issues were brought up in front of the Court in Quintana, they were considered, and they were rejected. The Court said that Rimmasch does not apply to fingerprint evidence. Fingerprint evidence has been accepted in the relevant community and there's nothing that the defendant did in that case to disturb the over 100 decades worth of jurisprudence saying that this evidence is admissible in Court.

Defense counsel argued that there are a number of jurisdictions that have excluded fingerprint evidence. I'm only aware of one trial court opinion where that is the case. I am aware of several jurisdictions that have considered the

same type of testimony that would be proffered here today, that after going through the hearing have decided that they would deny the defendant's motion to exclude the fingerprint evidence, that fingerprint evidence continues to be reliable and admissible in those jurisdictions.

As far as a jury instruction limiting any -- limiting what --

THE COURT: I'm not going to limit anything. It would be a cautionary instruction is what it would be.

MS. COOK: Thank you.

THE COURT: And it will address basically expert testimony.

MS. COOK: And your Honor, I think that's an appropriate instruction to give. In fact, it's one we routinely give in trials. And our juries here in Utah are instructed explicitly that the decision about what weight, if any, to give expert testimony is entirely their province. That is why we have the trial process. The experts are brought in here. They are subject to cross-examination. They may be challenged by defense experts, and expert testimony may be conflicting. The jury ultimately decides how much weight, if any, to give to that particular evidence.

THE COURT: I agree.

MS. COOK: And they know that they do not have to rely, just because an expert has given an opinion, on that

opinion. And in essence, they are instructed, expert testimony is not infallible. That's why it's subjected to the crucible of cross-examination.

And as far as any other jury instruction, your Honor, this has also been addressed by the courts in Hamilton, which is a case that I brought up in my argument. And the Court said we are not going to treat fingerprint evidence different from any other expert testimony. No need for special jury instructions just on fingerprint evidence. I believe that the instruction about expert witnesses will cover that.

And your Honor, finally, in regard to an argument that the witness should be limited, I think the Court has already indicated there isn't a need for that. I certainly agree. And Ms. Macken should be allowed to testify as to the examination that she did, about fingerprint evidence in general and the conclusion that she reached in this particular case.

Thank you, your Honor.

THE COURT: Thank you. Ms. Isaacson?

MS. ISAACSON: Just so we're clear about what we were attempting to address today was not uniqueness of fingerprint evidence but the fact that there is nothing to support the accuracy of these individualizations. And that was what Mr. Cole was going to focus on.

With respect to the jury instruction, I'd ask you to follow Judge Thorne's recommendation that we should instruct --

and this is in paragraph 14 of Quintana -- "We should instruct our juries that although there may be a scientific basis to believe that fingerprints are unique, there is no similar basis to believe that examiners are infallible."

THE COURT: Well, I don't know if I'll go to that extent. But I've got an instruction that I will probably be willing to give. If you want to submit one, we can talk about it when we have our pretrial.

MS. ISAACSON: And would you be willing to consider making one specific -- the concern in this case was that there was a general expert instruction, so we'd ask you to consider -- we'll submit one and have you take a look at it.

THE COURT: Well, you submit one, and then I'll decide which one I'll give.

MS. ISAACSON: Okay. And then with respect --

THE COURT: And Ms. Cook, you can submit one too if you'd like.

MS. COOK: Thank you, your Honor.

THE COURT: I think she had one in her memo, as I recall. Anyway...

MS. ISAACSON: With respect to the third issue, again, it's our request that the Court not permit the expert in this case to say this is a match. We believe that it's appropriate scientifically for her to say it's consistent. There is no other science that is brought before you where an

expert is permitted to say, a DNA expert, a blood expert, everyone acknowledges a margin of error, and it just seems to me inappropriate for this expert to be able to say that there is a zero error rate and this is a match without any sort of --

THE COURT: Well, I would hope that they wouldn't say it's a zero error rate, because I'm sure there are certain standards where errors were made.

MS. ISAACSON: Well, it's my understanding that that's the testimony that's routinely --

THE COURT: Is that what a match means, that there's a zero error rate?

MS. ISAACSON: Well, in the response to our request for discovery, Ms. Macken specifically said that there is a zero error rate.

THE COURT: In my opinion, that's got to be in evidence. All right.

MS. ISAACSON: Thank you.

MS. COOK: Your Honor, we need to talk about what we're dealing with when it comes to error rate. Ms. Macken is not going to get on the stand and say that a fingerprint examiner has never made a mistake. There obviously are incorrect identifications that have occurred. There are known and documented cases. And she is not going to deny that the experts who practice in this field can and in fact sometimes do make mistakes in identifications. And that is an area that she

is open to in cross-examination, and I'm sure will be explored thoroughly by counsel.

THE COURT: Sure.

MS. COOK: What counsel is referring to is the method for fingerprint examination, and there is no known error rate for the method of --

THE COURT: Well, she's not going to say that, is she? Is that going to be her testimony, there's no known error rate?

MS. COOK: Your Honor, she is. And if the Court would like to hear from Ms. Macken about that, I'd be happy to let her answer any questions you have.

THE COURT: Well --

MS. COOK: And your Honor, it may interest the Court to know that a DNA analysis could say the same thing. I was speaking with Pelar Shortsleeve in the crime lab yesterday, and she agrees there are practitioner errors in DNA. But as far as a mathematical error rate for DNA, she doesn't know how one would even begin to calculate such a thing, and --

THE COURT: That's a little different, though, I think. DNA is a lot different from fingerprint identification, isn't it?

MS. COOK: Certainly different, your Honor. But in terms of if we're going to require an error rate for it to be something that can be talked about in court --

THE COURT: Well, I suppose that if she says that and they challenge her in cross-examination, they're entitled to do that.

MS. COOK: Certainly, your Honor.

THE COURT: Okay? Everybody know where we are now? The motion for Rimmasch is denied. I will take a look at cautionary instructions. If you want to submit those, we'll do it at the pretrial, talk about them then. Anything else?

MS. ISAACSON: Just for clarification, I believe you've made yourself clear, but Dr. Cole will absolutely not be able to testify on any of these issues today?

THE COURT: Not today. I denied the motion for the hearing.

MS. ISAACSON: I understand that.

THE COURT: And I'm sorry that you brought him in, but seems to me that the motion had to be heard to determine whether a hearing was appropriate, and I've decided that it's not --

MS. ISAACSON: I understand.

THE COURT: -- under Quintana.

MS. ISAACSON: I understand. And your Honor, just one other issue so you're aware. There was one other forensic issue with respect to DNA in this case. We have come to a verbal agreement with the prosecution that neither side is going to discuss DNA evidence in this case. We've attempted to

draft multiple versions of a stipulation. We believe that we're close on that. But we believe that -- it's our verbal agreement that there will not be any evidence of DNA in this case. Just for the record.

THE COURT: Okay.

MS. ANDRUZZI: Your Honor, there was some DNA testing done, and we have agreed that the DNA testing that was done, nobody's going to talk about it in this case. We still are trying to get to a written stipulation, but the verbal stipulation should be on the record.

THE COURT: Well, if the agreement before me today is that neither party is going to talk about it, then that's what I would expect.

MS. ISAACSON: Understood.

THE COURT: I don't need to have a written stipulation if that's the agreement.

MR. BUGDEN: And then I wonder if you could just clarify or give us some help in understanding what it is that will assist you in making a decision about whether or not Dr. Cole will be permitted to testify at the trial so that we don't have again the same situation of bringing --

THE COURT: Bringing him in?

MR. BUGDEN: Bringing him in. Because we believe --

THE COURT: Well, you can talk with Ms. Cook and Ms. Andruzzi about it. If they have some objection to it, then

I'll hear it at the pretrial.

MR. BUGDEN: I'm sure that they're going to object.

THE COURT: I don't know why you can't bring in an expert.

MR. BUGDEN: I don't know why we couldn't, either. I don't know why you wouldn't tell us that right now, that we would be entitled to --

THE COURT: Well, I want to hear from them. I'm not just going to cross -- they may have a good reason why they think he ought not to testify. I don't know. I want to give them at least that opportunity. You're going to identify him as a expert and you want to call him at time of trial, right?

MR. BUGDEN: Right.

MS. ISAACSON: He's been identified as an expert.

THE COURT: Okay. And if they want to object to it, that's fine. I'll address it at the day of the pretrial. We're two weeks out on the pretrial date and the trial. Is that right?

MS. ISAACSON: Yes.

THE COURT: Okay.

MS. ISAACSON: I believe that's all, your Honor.

THE COURT: Okay, thank you. Ms. Cook, do you want to prepare the order on the denial of the motion?

MS. COOK: Will do, your Honor.

THE COURT: If you want to take some time to talk

about this expert issue, my inclination, my inclination is to allow you to do it.

Okay, we'll be in recess.

(Whereupon the proceedings were concluded.)

CERTIFICATE

STATE OF UTAH)
)
COUNTY OF UTAH)

This is to certify that the foregoing proceedings were taken before Vicky McDaniel, a Certified Shorthand Reporter in and for the State of Utah, residing in Salt Lake County, Utah;

That the proceedings were reported by me, Susan S. Sprouse, a Certified Shorthand Reporter, in stenotype, and thereafter caused by me to be transcribed into printed form, and that a true and correct transcription of said testimony so taken and transcribed is set forth in the foregoing pages, inclusive.

DATED this 17 day of NOVEMBER, 2009.

Susan S. Sprouse

SUSAN S. SPROUSE, RPR, CSR
License No. 5965543-7801

Addendum C

THIRD JUDICIAL DISTRICT COURT

FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, PLAINTIFF, VS. ROBERT MICHAEL SHEEHAN, DEFENDANT.	Case No. 061908535 MOTION HEARING

BEFORE THE HONORABLE WILLIAM W. BARRETT

SCOTT M. MATHESON COURTHOUSE
450 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84111

AUGUST 4, 2008

20090913-CA

REPORTED BY: Vicky McDaniel

ORIGINAL

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your Honor of this type, I know that you address almost all of these questions with the jury, and my experience has been that people are very open and willing to discuss things.

With the exception of No. 12, which is, would the consumption of alcohol by the alleged victim in this case affect your ability to be fair and impartial --

THE COURT: I don't know that I would ask that question.

MS. ANDRUZZI: We rephrased it by any witness in this case. I don't think we have an opposition to that, but I don't want to draw attention to the fact that the victim had been drinking. Thank you.

THE COURT: Thanks. All right.

I guess the other issue, the motion in limine, requesting that I allow your expert to testify.

MS. ISAACSON: Correct. Would you like me to address that, your Honor?

THE COURT: Yes.

MS. ISAACSON: Well, as you mentioned during the last hearing that we had here when we were talking about this issue, we talked a lot about State vs. Quintana, and Judge Thorne noted, and I think you made a comment, you know, fingerprint evidence has basically been accepted for a hundred years. I think that was the term that you used. And Judge Thorne noted that, quote, "Fingerprint evidence has been afforded near

magical quality in our culture." I mean, that's the reality.

Most potential jurors will not know that there have been cases, high profile cases of misidentification. And they're also not going to know that there are -- there are problems, that there are times where misidentification occurs.

There's a very well known example of Brandon Mayfield, who was an Oregon attorney, who happened to be Muslim. The F.B.I., all their experts said he had a fingerprint in the Madrid bombings. And he spent a week in detention and then they finally figured out loops were wrong.

I can cross-examine their expert and bring that up, but I think it's important that we have our own expert to come in and testify about the shortcomings of fingerprint identification. And one thing that we talked about last time is the concept that their expert's going to come in and say, there is a zero error rate; and the idea that there is a zero error rate just isn't true.

Now, I cited a couple cases to the Court in support of our request to bring in our expert. The first one is -- the two main ones are out of the Third Circuit. I understand they're not controlling, but the factual underpinnings of those cases, I think, are helping.

One is a handwriting case where the defense wanted to bring in an expert to talk about the shortcomings of handwriting analysis. And the judge said, no, we don't need to

hear that, and the appellate court said that's reversible error.

And then there was another case, the Mitchell case in 2004, regarding fingerprint testimony, same thing. Defense wanted to bring in an expert, trial court said no, and ultimately they were reversed.

Utah courts really haven't decided this issue about whether or not we can bring in someone to comment on them. He is not a latent fingerprint analysis expert. He doesn't analyze fingerprints. But what he does do is research about the infallibility -- well, the fallibility of fingerprint evidence. We think we're entitled under Rule 702 to bring in that evidence, and we're asking you to let us do so.

THE COURT: Okay. Ms. Cook or Ms. Andruzzi, go ahead.

MS. ANDRUZZI: I'll just briefly respond, your Honor. I think what we're talking about is, we've been here before. We were here and your Honor made the decision that they're not entitled to a Rimmasch hearing. Well, now we're going to circumvent that by allowing them to present to the trier of fact a question of law, whether or not fingerprint testimony or fingerprint identification is acceptable. Our courts have found that it is acceptable and that it is reliable, and that's it.

Now, I think they're entitled to bring someone in who

is a latent fingerprint expert to say that the methods employed in this case were not right and that there may be error in this case based upon the way that it was done. But I don't think you can bring in an expert and get around Rimmasch and bring in an expert to tell the jury, the trier of fact, that fingerprint expert is not reliable when our appellate courts have said that it is. I don't think it's reversible error when our appellate courts have told you that it's not. They've already said that.

It is not reversible error, because fingerprint testimony is reliable. That's what Quintana said. That's why they're not entitled to a Rimmasch hearing. And for them to now try to have a Rimmasch hearing during the trial, I think circumvents your prior ruling. Our expert, in fact, is not going to say that there is a zero error rate. Their testimony would be that the error rate is not known. That is the testimony.

In this case those results, it's not as if you just had one person looking at those results subjectively and submitting that there's a match. There are checks and balances, and I think they're entitled to test those checks and balances in front of the trier of fact. I don't think they're entitled to bring in a Ph.D. to talk about the fact that he studied this and there have been mistakes in the past.

I think that that gets around Rimmasch. I don't think it's necessary, and I think that it is a question of law

rather than a question of fact. And that question of law, your Honor, has already been decided by the trier of law, which is you.

Thank you.

MS. ISAACSON: And your Honor, the Court determines admissibility, and ultimately the jury is going to decide the weight to give the evidence. We're not asking you to exclude the fingerprint evidence. We just want a fair chance to respond to the expert with our own expert.

THE COURT: Well, you're not, though. What you're going to do is you're going to go into all these studies and stuff that he's done saying mistakes can be made. Well, you can cross-examine him on that.

MS. ISAACSON: But cross-examining is not the same as putting forward --

THE COURT: I understand that. I understand that. But -- and I've been thinking about this since our last hearing, and I guess I have to go with what the Supreme Court said, and that is, we treat fingerprint evidence like any other evidence and do not evaluate its sufficiency to support a conviction by a separate or extraneous standard. And that's a quote by whoever wrote this, Judge Bench, on this Quintana case. So we didn't have the Rimmasch hearing. I'm going to deny your motion.

You've made your record. This is probably something

that ought to go up, but I'm sticking with Quintana.

MS. ISAACSON: Your Honor, if I could just add one piece of information that I was going to add. We did receive a response from Lisa Macken (phonetic) who is the expert for the State, and what she said in her response to us was the error rate of the Ace-V methodology is zero.

So the idea that she's going to be permitted to say the error rate is zero, and that -- I can cross-examine her on that, but then I don't have my own expert that I think we're entitled to under Rule 702 to come in and say, well, that's just simply not true; that's simply not accurate.

THE COURT: Well, Ms. Andruzzi told me she wasn't going to testify to that.

MS. ISAACSON: Well, at least in her answer to us on June 11th of 2008, that's what she said.

THE COURT: Okay. Well, I'm going to deny your motion.

Now, what do you want to do about rescheduling this? This is the problem I have. I'm booked up through the end of the year, basically.

MS. ISAACSON: Well, let's look at some dates.

THE COURT: I can't give you any dates right now.

MS. ISAACSON: Well, would you want to set it for a scheduling conference and then look at dates?

THE COURT: That's what I'm going to have to do. I